LIBRARY
SUPREME COURT, U. S.

No. 953

Office-Supreme Court, U.S.
FILED
DEC 15 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND COMPANY
and
MONTGOMERY WARD AND COMPANY,

Petitioners,

vs.

JAMES R. HORTON, Trustee in Bankruptcy of Marion Cummings and Audrey Alberta Cummings
and
WILLIAM R. YOUNG, Trustee in Bankruptcy of Benancio Ernest Dominguez and Cora Esther Dominguez,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HERBERT W. DeLANEY, JR.
1601 West Evans
Denver, Colorado 80223
936-4841
Attorney for Petitioners
Sears, Roebuck and Company and
Montgomery Ward and Company.

INDEX

Page

OPINIONS BELOW 2

DATE OF JUDGMENT AND TIME OF ENTRY 3

JURISDICTION 3

QUESTION PRESENTED FOR REVIEW 3

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 4

STATEMENT OF CASE 10

ARGUMENT 14

CONCLUSION 29

APPENDICES

APPENDIX A

Decision by the United States Court of Appeals for the Tenth Circuit dated August 12, 1969, affirming United States District Court for the District of Colorado 33

APPENDIX B

Order, Judgment and Decree of the United States District Court entered October 17, 1968 43

INDEX (continued)

Page

APPENDIX C
Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim Filed by Sears, Roebuck and Company Entered May 9, 1968 47

APPENDIX D
Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim Filed by Montgomery Ward and Company Entered June 13, 1968 57

APPENDIX E
Stipulation of Facts in the Matter of Marion Cummings, signed by James R. Horton, Trustee in Bankruptcy; Herbert W. DeLaney, Jr., attorney for Sears, Roebuck and Company, and Robert Carr, attorney for Bankrupt 66

APPENDIX F
Stipulation of Facts in the Matter of Benancio Ernest Dominguez, signed by William R. Young, Trustee in Bankruptcy, and Herbert W. DeLaney, Jr., attorney for Montgomery Ward and Company 71

TABLE OF CASES CITED

Page

Duffy v. Tegler
(C. C. A. 8th Cir.), 19 F. 2d 305 25

In Re: Espelund
(D. C. W. D. Washington 1960)
181 F. Supp. 108, 111-115 19

In Re: Groves
(D. C. Ohio), 6 Am. B. R. 728 20

Hogan v. Hall
(C. C. A. 5th, 1941), 118 F. 2d 247... 20

Lockwood v. Exchange National Bank
(1903), 190 U. S. 294, 299, 23 S.
Ct. 751 .....17, 24, 26, 29

In the Matter of Rabb
(D. C. Tex.), 21 F. 2d 254,
Rev'd. on Other Grounds
29 F. 2d 914 25

Sears, Roebuck and Company v. Schulein
(9th Cir. 1960)
282 F. 2d 267, 270-271 .....15, 16, 19

STATUTES CITED

	Page
*C.R.S. 1963, §77-2-1(6)	9, 18
*C.R.S. 1963, §77-2-2	9, 17
*C.R.S. 1963, §77-2-3	9, 18, 26
11 U.S.C. §75(a)(6) Section 47a(6) The Bankruptcy Act	4, 18
11 U.S.C. §110(a) Section 70a The Bankruptcy Act	4, 18, 28
11 U.S.C. §110(e)	16, 18
11 U.S.C. §110(e)(2) Section 70e(2) The Bankruptcy Act	7, 18
11 U.S.C. §111(e)	29
28 U.S.C. §47	3
28 U.S.C. §1254(1)	3

*Colorado Revised Statutes

MISCELLANEOUS

Page

1 Collier on Bankruptcy, 14th Ed.
- Para. 6.05, P-805 16
- Para. 6.05, P-808 17
- Para. 6.05, P-809 24
- Para. 6.05, P-816 25
- Para. 6.06, P-818 19
- Para. 6.24, P-912 23

4A Collier on Bankruptcy, 14th Ed.
- Para. 70.08, P-99 28

11 Collier on Bankruptcy, 14th Ed.
Handbook for Trustees and Receivers in Bankruptcy
- Para. 8.004, P-159 ..... 20, 24
- Para. 8.004[2], P-160 22
- Para. 8.005, P-164 23

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1969

SEARS, ROEBUCK AND COMPANY)
AND)
MONTGOMERY WARD AND COMPANY,)
)
Petitioners,)
)
vs.)
)
JAMES R. HORTON, Trustee in)
Bankruptcy of Marion Cummings)
and Audrey Alberta Cummings)
and)
WILLIAM R. YOUNG, Trustee in)
Bankruptcy of Benancio Ernest)
Dominguez and Cora Esther Dominguez,)
)
Respondents.)

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, SEARS, ROEBUCK AND COMPANY and MONTGOMERY WARD AND COMPANY, hereby Petition for a Writ of

Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on August 12, 1969, affirming the Order, Judgment and Decree of the United States District Court for the District of Colorado, wherein the United States District Court affirmed the decisions of the Referees in Bankruptcy and denied Petitions to Review filed by Sears, Roebuck and Company and Montgomery Ward and Company.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on August 12, 1969 (Appendix A, infra) and officially reported at 413 F. 2d 1281.

The Order, Judgment and Decree of the United States District Court entered on October 17, 1968 (Appendix B, infra) has not yet been officially reported.

The Memorandum Opinion, Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim filed by Sears, Roebuck and Company entered on May 9, 1968 (Appendix C, infra) has not been officially reported.

The Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders of the Referee in Bankruptcy, on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim filed by Montgomery Ward and Company entered

on June 13, 1968 (Appendix D, infra) has not been officially reported.

DATE OF JUDGMENT AND TIME OF ENTRY

The judgment sought to be reviewed was made and entered on August 12, 1969, by the United States Court of Appeals for the Tenth Circuit. No petition for a rehearing was filed by Petitioners.

On October 31, 1969, Mr. Justice White of this Court granted an Order extending the time for filing a Petition for Writ of Certiorari, to and including December 15, 1969.

JURISDICTION

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. §1254(1) and 28 U.S.C. §47.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Bankruptcy Court has the power to administer exempt property after a Bankrupt has claimed the property as exempt and the Trustee has allowed the property as exempt and the Bankruptcy Court has approved the Trustee's Report of Exempt Property.

II. Whether upon application of the Trustee the Bankruptcy Court has the power to void the lien of a secured creditor on property of the bankrupt after the Trustee has allowed the

property to the bankrupt as exempt and the Bankruptcy Court has approved the Trustee's Report of Exempt Property.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

11 U.S.C. §75(a)(6)
Section 47(a)(6), The Bankruptcy Act

a. Trustees shall ... (6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment;

11 U.S.C. §110(a)
Section 70(a), The Bankruptcy Act

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: Provided, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to

prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or

other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

11 U.S.C. §110(e)
Section 70(e), The Bankruptcy Act

e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a

bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had

not intervened and any court of bankruptcy shall have concurrent jurisdiction.

Colorado Revised Statutes 1963

77-2-2. Property exempt. —(1) (a) The following property shall be exempt from levy and sale under writ of attachment or writ of execution: . . .

(f) The household goods owned and used by the head of a family or owned by such head and used by his or her dependents to the extent of seven hundred fifty dollars in value, and owned and used by a single person to the extent of two hundred fifty dollars in value.

Colorado Revised Statutes 1963

77-2-1. Definitions. —As used in this article the following words and phrases shall mean: . . .

(6) Value is the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens.

Colorado Revised Statutes 1963

77-2-3. No exemption for purchase price. —None of the property described in section 77-2-2 shall be exempt from levy and sale on writ of attachment or writ of execution for the purchase price of such property.

STATEMENT OF CASE

Sears, Roebuck and Company and Montgomery Ward and Company, as Petitioners, have appealed the judgment entered August 12, 1969, of the United States Court of Appeals for the Tenth Circuit affirming the Order, Judgment and Decree entered by the United States District Court on October 17, 1968, which affirmed the Orders issued by the Referees in Bankruptcy in the Bankrupt Estates of Marion Cummings, Bankrupt No. 67-B-3416 and Audrey Alberta Cummings, Bankrupt No. 67-B-3417, and Benancio Ernest Dominguez, Bankrupt No. 67-B-3892 and Cora Esther Dominguez, Bankrupt No. 67-B-3893.

The basis for Federal jurisdiction in the Bankruptcy Court was the litigation between Petitioners and the Trustees in Bankruptcy in said Bankruptcy Court.

Petitioners are Sears, Roebuck and Company and Montgomery Ward and Company and the Respondents are James R. Horton, Trustee of the Bankrupt Estates of Marion Cummings and Audrey Alberta Cumming's, Bankrupts; and William R. Young, Trustee of the Bankrupt Estates of Benancio Ernest Dominguez and Cora Esther Dominguez, Bankrupts. The parties stipulated as to the pertinent facts in the Bankrupt Estates which stipulations were reduced to writing and are set forth in Appendixes E & F, infra.

Because a common question of law was involved in the Bankrupt Estates, they were consolidated in the United States District Court for

the District of Colorado. This appeal involves the correctness of the judgment of the United States Court of Appeals for the Tenth Circuit which affirmed the Order, Judgment and Decree of the United States District Court which affirmed the Orders of the Referees in the above-referenced Bankrupt Estates.

As to the Estates of the Bankrupts, Marion Cummings and Audrey Alberta Cummings, husband and wife, it was stipulated that they had purchased one table and four chairs from Sears, Roebuck and Company on a conditional sales contract which instrument was not recorded or filed with the County Clerk and Recorder, said purchase taking place on May 28, 1965, and thereafter on August 15, 1965, said Bankrupts purchased on a conditional sales contract one automatic washer and electric dryer from Sears, Roebuck and Company; then on September 22, 1967, both of said Bankrupts filed their voluntary Petitions in Bankruptcy and were duly adjudicated Bankrupts.

Said Bankrupts, in their original Petitions and Schedules in Bankruptcy and at all times subsequent thereto, have claimed said property purchased from Sears, Roebuck and Company as exempt property under the exemption statutes of the State of Colorado, and the Trustee, James R. Horton, subsequent to his appointment and prior to November 9, 1967, filed his Report of Exempt Property, allowing said property as exempt property. Said Report was approved by the Bankruptcy Court.

As to the Estates of Benancio Ernest Dominguez and Cora Esther Dominguez, husband and wife, it was stipulated that a guitar and amplifier and a range had been purchased from Montgomery Ward and Company, prior to October 31, 1967, pursuant to the terms and conditions of a chattel mortgage, which was not filed or recorded with the County Clerk and Recorder, and that on October 31, 1967, they were duly adjudged Bankrupts and that the Dominguezes claimed said personal property exempt under the applicable exemption statutes of the State of Colorado, and that the Trustee in Bankruptcy filed his Report of Exempt Property allowing said property as exempt which Order was approved by the Bankruptcy Court.

Sears, Roebuck and Company made application to the Bankruptcy Court to foreclose upon or reclaim the property heretofore described as purchased by the Cummingses, which they claimed to be exempt and which property the Trustee reported and the Court approved as being exempt. After having previously allowed said property as exempt, and the Court having approved said exemption of said property, the Trustee, James R. Horton, answered claiming the lien asserted by Sears, Roebuck and Company was not perfected as to third parties as required by Colorado law, and said Trustee sought to have the lien declared void and requested orders for the appraisal and sale of the goods involved.

Montgomery Ward and Company made application to the Bankruptcy Court to foreclose upon or reclaim the property heretofore described as purchased by the Dominguezes, which they claimed

to be exempt and which property the Trustee allowed as exempt and the Court approved as being exempt. After having previously allowed said property as exempt, and approved said exemption of said property, the Trustee, William R. Young, also answered declaring the invalidity of said claimed lien on the basis that there was no evidence of filing of the Chattel Mortgage involved and prayed that the application of Montgomery Ward and Company to foreclose on the heretofore described personal property purchased by the Dominguezes be denied, and the lien asserted by Montgomery Ward and Company be declared void, said property appraised and sold under Order of the Court.

Pursuant to the answers of said Trustees, upon hearing, the Referees ruled that the Mortgages of Sears, Roebuck and Company and Montgomery Ward and Company were invalid as to the Trustees, and that said liens should be preserved for the benefit of the Bankrupt Estates, and that the goods involved should be appraised and sold and any amounts received over and above the indebtedness due Sears, Roebuck and Company and Montgomery Ward and Company, respectively, should be paid over to the respective Bankrupts, not to exceed the amount allowable under the exemption laws of the State of Colorado, and Sears, Roebuck and Company and Montgomery Ward and Company were given thirty (30) days to file their respective claims as unsecured creditors.

Although the amount involved in this particular case is not great, the United States Court of

Appeals for the Tenth Circuit in its decision which is attached hereto as Appendix "A" stated:

> ". . . The issue presented here is of sufficient importance to the administration of bankruptcy proceedings in the district of Colorado to be an exceptional circumstance. The appeal is allowed."

ARGUMENT

Pursuant to the stipulated facts in this matter, as contained in the two Stipulations of Facts which are attached hereto in Appendixes "E" and "F" respectively, the Trustees filed their Reports of Exempt Property, allowing the subject property as exempt as claimed by the Bankrupts, and Orders were duly entered by the Bankruptcy Court approving the Trustees' Reports of Exempt Property. (Emphasis supplied.)

After the allowance of the exemptions on the property involved, to the Bankrupts by the Trustees and the Court's approval of the Trustees' Reports of Exempt Property, the Trustees thereafter made application to the Bankruptcy Court to void the liens on exactly the same property which had been granted exempt to the Bankrupts, which applications were granted by the Referees in Bankruptcy and which Orders are now the subject matter of this appeal.

It is respectfully submitted that after property has been allowed as exempt to a Bankrupt, the Trustee can no longer seek to administer said property and the Bankruptcy Court no longer has

any jurisdiction to administer the exempt property after the Bankruptcy Court has determined that the property is exempt as against creditors in general. In Sears, Roebuck and Company v. Schulein (9th Cir. 1960), 282 F. 2d 267, the Court held, inter alia, on page 270, as follows:

> "The Court of Bankruptcy does not have the power to administer exempt property. Lockwood v. Exchange Bank, 190 U.S. 294, 23 S. Ct. 751, 47 L. Ed 1061; Baumbaugh v. Los Angeles Morris Plan Co., 9 Cir. 30 F. 2d 816. After the bankrupt has claimed his exemptions the trustee has the duty to 'set apart the bankrupts' exemptions allowed by law, as claimed and report the items and estimated value thereof to the Court as soon as practicable after their appointment.' Bankruptcy Act, §47, sub. a(6), 11 U.S.C.A. §75, sub. a (6). Section 70 of the Bankruptcy Act, provides that title to the non-exempt property vest in the trustee; the exempt property is specifically excluded. Once the Bankruptcy Court has determined that the property is exempt against the creditors in general it is to be set apart and further administration of it refused, even if as to some creditors the property might not be exempt. In re Lippow, 7 Cir. 92 F.2d 619; 3 Remington on Bankruptcy, § 1271, at p. 143. (Emphasis supplied.)

and further, on page 271, the Court held, inter alia, as follows:

> "Section 70, sub. e(2) does not authorize the trustee to enforce for the benefit of the estate

> conditional sales contracts upon exempt property." (Emphasis supplied.)

The decision of Schulein, supra, applies to the facts of this case since the Trustee has allowed the property involved to the Bankrupts as exempt, and the Bankruptcy Court approved the Trustees' Report of Exempt Property and the Court did not have any further jurisdiction over the property involved in this case. (Emphasis supplied.) Consequently, 11 U.S.C. 110(e) is not applicable and should not have been invoked by the Bankruptcy Court to void the liens of Petitioners.

The Schulein case, supra, is not alone in holding that the Bankruptcy Court has no jurisdiction to adjudicate matters concerning property once it is set aside as exempt. In 1 Collier on Bankruptcy, 14th Ed. Para. 6.05, P-805, it is stated as follows:

> "A court of bankruptcy has jurisdiction to decide the merits of the bankrupt's claim to exemptions but, as a rule, has no jurisdiction over the property it determines exempt beyond that necessary to set it aside to the bankrupt.[1] (citing cases) It was said in Schwanz v. Farmers' Co-operative Co.[2] (citing cases) that 'Exempt property constitutes no part of the bankrupt estate, and the jurisdiction of the bankruptcy court is limited to the ascertainment and setting off to the bankrupt of the exempt property.' The court, thereafter, has no power to administer or distribute such property with the other assets of the bankrupt estate,[3] (citing cases) but where exempt

> property is commingled and undivided from other property of the estate, the bankruptcy court retains jurisdiction of the property for the purposes of separation.[4] (citing cases). It follows that the court cannot order the sale of exempt property, except where it is indivisible from non-exempt property.[5] (citing cases). (Emphasis supplied.)

On P-808 of Collier, supra, it is stated:

> ". . . However, after the bankruptcy court has determined that property is exempt from distribution in the bankruptcy proceeding, the question of whether a lien or claim of a creditor is valid against the property because of a partial waiver or statutorily imposed limitation must, under present law, be litigated in a different forum.[8] (citing cases)" (Emphasis supplied.)

Property which is exempt under State law and which is determined to be exempt by the Bankruptcy Court is no part of the estate of Bankruptcy. 11 U.S.C. §110(a); Lockwood v. Exchange National Bank, (1903) 190 U.S. 294, 299.

Since the issues herein involve exemptions on household goods, the Court's attention is directed to C.R.S. 1963, §77-2-2, wherein it is provided, inter alia, as follows:

> "Property exempt. -- (1)(a) The following property shall be exempt from levy and sale under writ of attachment or writ of execution;
>
> * * *

> "(f) The household goods owned and used by the head of a family or owned by such head and used by his or her dependents to the extent of seven hundred fifty dollars in value, and owned and used by a single person to the extent of two hundred fifty dollars in value."

The word "value" as used in the foregoing is defined by Colorado Revised Statutes 1963, §77-2-1 (6):

> "Value is the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens."

Colorado Revised Statutes 1963, §77-2-3 provides that no property is exempt from levy and sale for the purchase price thereof.

The relationship between the Colorado Exemption Statutes and the application of the various provisions of The Bankruptcy Act to the Colorado Exemption Statutes must be considered. Section 47 (a)(6), 11 U.S.C. §75(a)(6), provides that the Trustee shall set apart the bankrupt's exemptions as allowed by law and report the items and the estimated value to the Court. Section 70a, 11 U.S.C. §110(a), vests title in the Trustee to the Bankrupt's property except for that which is exempt. Section 70e(1) says that certain transfers are void as against the Trustee. Section 70e(2), 11 U.S.C. §110(e)(2) reads:

> "All property of the debtor affected by any such transfer shall be and remain a part of

> his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

The proviso in the above quoted section was added by a 1952 amendment. The case of In re Espelund (D.C.W.D. Washington 1960), 191 F. Supp. 108, 111-115, holds that the proviso does not bring exempt property within the operation of the Act. In Sears v. Schulein, supra, the Ninth Circuit expressly approved of Espelund. See 282 F. 2d 267, at 270-271. Schulein and Espelund are in point on this case since "property" was allowed to the bankupts as exempt by the trustees and not "equity" or "value."

In 1 Collier on Bankruptcy, 14th Ed., Para. 6.06, P-818, in discussing §6 of The Bankruptcy Act, it is stated:

> "The rights and duties of the trustee in bankruptcy with respect to exemptions of bankrupts are set out in §47a(6), as supplemented by General Order 17[1] (citing cases).

In brief, after the bankrupt has duly asserted his claim to exemptions[2] (citing cases), the trustee must estimate and determine the value of the exemptions claimed[3] (citing cases), and make an itemized report setting them off within five days after receiving notice of his appointment, . . .

* * *

"Until the exemptions are fixed, the trustee has the right to possession of the property claimed[11] (citing cases), . . . As soon as the claim is determined in favor of the bankrupt, the trustee should at once surrender possession, for an exemption is a matter of right and the trustee may not ordinarily withhold it from the bankrupt.[14] (citing cases) . . . " (Emphasis supplied.)

Appraisal of the exempt property is not required. As a matter of fact, the requirement as to appraisal in §70f of The Bankruptcy Act, pertains only to property "belonging to the Bankrupt Estate." [In re: Groves (D. C. Ohio), 6 Am. B. R. 728].

The Bankruptcy Court looks to the state law to determine the extent of a bankrupt's exemptions, from what property they are allowable, and how they may be claimed [Hogan v. Hall (C.C.A. 5th, 1941), 118 F. 2d 247].

In 11 Collier on Bankruptcy, 14th Ed. (Handbook for Trustees and Receivers in Bankruptcy), Para. 8.004, P-159, it is stated:

"§8.004. Procedure to Claim and Set Aside Exemptions. [1] In General.

"While the Bankruptcy Act will follow and adopt the state laws in determining the nature and the extent of the exemptions claimed, the manner in which the exemptions are to be claimed and set aside and allowed to the bankrupt is regulated by the Bankruptcy Act and the rules governing practice and procedure in bankruptcy. Properties ultimately determined to be exempt do not become part of the bankrupt's estate.[49] (citing cases) The jurisdiction of the bankruptcy court with regard to the exempt property is limited to a determination of the bankrupt's right to claim exemptions and the extent of the exemptions to be allowed. This power to determine and set apart exempt properties is exclusive. Once such determination is made, the jurisdiction of the bankruptcy court over properties determined to be exempt is relinquished, and any controversy with regard to such properties--for instance, determination of liens or title rights--must be determined by a state court of competent jurisdiction.

". . . The fact that the property in question was not paid for or the fact that they are validly encumbered does not preclude the bankrupt to claim such properties as exempt and have them set aside as such; . . . Properties exempt from the claim of his general creditors does not preclude a creditor with a valid security interest to enforce his claim against the property in

an appropriate state court proceeding or to repossess the property after it has been set aside as exempt." (Emphasis supplied.)

At 11 Collier on Bankruptcy, 14th Ed. (Handbook for Trustees and Receivers in Bankruptcy) Para. 8.004[2], P-160, it is further stated:

". . . If, under the applicable state law the exemption depends on the valuation of the property, the trustee may or may not accept the valuation placed on the articles by the bankrupt. . . The trustee is not bound by the valuation placed on the articles by the bankrupt. The articles should be valued at their current fair market value and not at their original cost of acquisition. This is especially important with regard to household goods and appliances which are usually subject to very fast depreciation and have little or no resale value. . .

"Generally speaking, the trustee has no power to sell the bankrupt's exempt properties. . ." (Emphasis supplied.)

Also, it is to be noted that:

"If exempt properties were taken by the trustee, they must be surrendered by him to the bankrupt, once the order approving the Report of Exempt Property is entered and the properties were allowed and set aside as exempt. . . It is not the trustee's function to determine opposing claims to such property between the bankrupt and others. . ." (Id., Handbook for Trustees and

Receivers in Bankruptcy, Para. 8.005, P-164; Emphasis supplied.)

If the Referees' holding were correct in this case, what do the Trustees surrender to the Bankrupt, if not property? As stated in 1 Collier on Bankruptcy, 14th Ed., Para. 6.24, P-912:

> "Property set apart to the bankrupt as exempt forms no part of the bankrupt estate . . ."

In the instant case, the Trustee allowed property and the Bankruptcy Court approved the allowance of the property involved herein, as exempt property.

In its Opinion, the Court below specifically stated:

> ". . . [T]he Trustees reported to the Referees that these exemptions were permissible and the Referees entered their Orders approving the Trustees' Report of Exempt Property. . ."

As seen from the foregoing authorities, when said property was determined to be "exempt", and set aside as such by the Trustees and approved by the Bankruptcy Court, the Bankruptcy Court lost jurisdiction over said property.

As seen from the Stipulation of Facts herein, the "property" involved was "claimed specifically exempt. . ." and the ". . . Trustee filed his Report of Exempt Property allowing said property as exempt. . ." and it was further stipulated that

an ". . . Order approving same was duly entered by this [the Bankruptcy] Court." Specific "property" was claimed and allowed as exempt, not the "equity" in said "property." As previously pointed out, 11 Collier on Bankruptcy, 14th Ed., Para. 8.004, P-159 (Handbook for Trustees and Receivers in Bankruptcy) states:

> ". . . The jurisdiction of the bankruptcy court with regard to the exempt property is limited to a determination of the bankrupt's right to claim exemptions and the extent of the exemptions to be allowed. . . Once such determination is made, the jurisdiction of the bankruptcy court over properties determined to be exempt is relinquished, and any controversy with regard to said properties--for instance, determination of liens or title rights--must be determined by a state court of competent jurisdiction. . ." (Emphasis supplied.)

Also, in 1 Collier on Bankruptcy, 14th Ed., Para. 6.05, at P-809, it is stated:

> "Shortly after the passage of the Act of 1898, it was thought in some districts that the bankruptcy court had power to pass on the validity of and enforce liens on exempt property. The Supreme Court, however, in Lockwood v. Exchange Bank (190 U.S. 294, 10 Am. B.R. 107, 23 S.Ct. 751, 41 L.Ed. 1061) clearly negatived this view. The rule is now well settled that the bankruptcy court has no jurisdiction to enforce a lien or claim upon exempt property and that such matters

must be litigated, usually in the state courts . . ." (Emphasis supplied.)

In Duffy v. Tegler (C.C.A. 8th Cir.), 19 F.2d 305, the Court stated:

> "The title to the property of a bankrupt generally exempt to him by the laws of the state remains in him and does not pass to the trustee in bankruptcy, and when a court of bankruptcy has determined the property that is exempt generally to the bankrupt and set it apart to him, it has exhausted its jurisdiction over said property. . . ." (Emphasis supplied.)

In the Matter of Rabb (D.C. Tex.), 21 F.2d 254, Rev'd on Other Grounds, 29 F.2d 914, the Court said:

> ". . . When the bankruptcy law limits the authority of a bankruptcy court to the ascertainment of the homestead and the segregation of it to the use of the bankrupt, nothing more may be attempted.
>
> ". . . It is quite clear that whether exempt property is subject to equities, liens, or judgments of individuals or special creditors is not the concern of the bankruptcy court, and must be threshed out and determined in state tribunals." (Emphasis supplied.)

Also at 1 Collier on Bankruptcy, 14th Ed., Para. 6.05, at P-816, it is stated:

". . . . The fact the property is not paid for and that certain creditors may have a lien on it for their purchase money, by statute or otherwise, should not prevent it from being set aside as exempt in the bankruptcy proceedings. [Citing Matter of Lippow (C.C.A. 7th Cir. 92 F. 2d 619; In Re: J. E. Maynard & Co. (D.C. Ga.), 183 F. 823; In Re: Seydel (D.C. Iowa), 118 F. 823.] As pointed out in Matter of Lippow, the only question for determination in the bankruptcy court is whether as against general creditors the property is exempt. If so, the exemption should be set apart, even though as to specific creditors the property may not be exempt. Any other result is not in accord with the doctrine established by the Lockwood case. [190 U.S. 294, 23 S.Ct. 751, 47 L. Ed. 1061]."

As noted in the previous quotation, the only question for determination by the Bankruptcy Court was whether as against "general creditors," the property involved herein was "exempt." If so, ". . . the exemption should be set apart . . ." and this is true ". . . even though as to specific creditors property may not be exempt . . .". C.R.S. 1963 §77-2-3 specifically states:

"None of the property described in Section 77-2-2 shall be exempt from levy and sale on writ of attachment or writ of execution for the purchase price of such property." (Emphasis supplied.)

Even assuming without admitting that somehow value or equity and not property was granted as

exempt to the Bankrupts, in order for Lockwood v. Exchange National Bank to still be the law, it would be necessary to make the same ruling with regard to equity or value as has been made with regard to property, namely, that the Bankruptcy Court has no power to administer the exempt value or equity since it was granted as exempt to the bankrupt.

The Court of Appeals in its decision, Appendix "A" supra, at page 10, stated:

> "We are aware that no Colorado decision which decides whether the Section 77-2-2(1)(f) exemption applies to equity value, stated in terms of dollars, or to property. In such circumstances we will accept the Federal trial judge's interpretation of his state law unless convinced that he is clearly wrong.' Texaco, Inc., v. Pruitt, 10 Cir., 396 F.2d 237, 243, and Dallison v. Sears, Roebuck and Company, 10 Cir., 313 F. 2d 343, 347."

Counsel for Petitioners does believe that the Federal trial judge's interpretation of the state law is clearly wrong based upon the facts of this case, namely that the parties stipulated that property was allowed to the Bankrupts as exempt by the Trustees and not value or equity. (Emphasis supplied.) If the Trustees or the Bankruptcy Court believed that value or equity should have been granted to the Bankrupt as exempt rather than property, then the Trustees' Reports of Exempt Property should have allowed value or equity to the Bankrupt. Instead, property was granted to the Bankrupts as exempt and the Bankruptcy Court wrongfully interpreted the exemption

statute where the facts do not apply to the interpretation thereby allowing the Bankruptcy Court to hold in favor of the Trustees in Bankruptcy in this particular case.

Section 70a of The Bankruptcy Act, 11 U.S.C. §110(a) specifically states that:

> "The trustee of the estate. . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition. . . except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located. . ." (Emphasis supplied.)

Thus, said Section 70 does not "vest title" of the Bankrupt's property in the Trustee as to ". . . property which is held to be exempt. . ."

In commenting on Section 70 of The Bankruptcy Act, it is stated in 4A Collier on Bankruptcy, 14th Ed., Para. 70.08, P-99, that:

> "Exempt property constitutes one class of property that expressly does not pass to the trustee under the Act. Section 70 provides that the trustee of the bankrupt's estate shall be vested with the title of the bankrupt 'except insofar as it is to the property which is held to be exempt.' This refers, of course, to the property declared exempt under §6 of the Act, which section gives full effect to the exemption statutes of the states and the United States." (Emphasis Supplied.)

CONCLUSION

The lower courts, in deciding this matter, have completely ignored the ruling of the Lockwood v. Exchange National Bank case, supra, decided in 1903 by this Court, which held that the Bankruptcy Court has no jurisdiction to enforce a lien or claim upon exempt property and that such matters must be litigated, usually in the state courts. The ruling by the Bankruptcy Court that equity or value was granted as exempt is contrary to the facts of this case. The Bankrupts claimed the property as exempt, the Trustee allowed the property as exempt, and the Bankruptcy Court approved the Trustee's Report of Exempt Property. The Bankruptcy Court cannot thereafter state that something other than property was allowed as exempt since it is stipulated to as a part of the facts of this case that property was allowed as exempt to the Bankrupts by the Trustees and the Bankruptcy Court approved the Trustees' Reports of Exempt Property. Nowhere does it appear that value or equity was granted to the Bankrupts as exempt. Property is exactly what the Trustees allowed to the Bankrupts as exempt. The ruling by the lower Court holding in favor of the Trustees' position and voiding Petitioners' liens under 11 U.S.C. §111 (e) and allowing the Bankruptcy Court to enforce a claim upon exempt property is completely contrary to the ruling of this Court in the case of Lockwood v. Exchange National Bank, supra.

Petitioners respectfully request that this Honorable Court grant certiorari and the judgment below should be reversed.

Respectfully submitted,

HERBERT W. DeLANEY, JR.

1601 West Evans
Denver, Colorado 80223

Attorney for Petitioners

Sears, Roebuck and Company
and
Montgomery Ward and Company

APPENDICES

Page

APPENDIX A

Decision by the United States Court of Appeals for the Tenth Circuit dated August 12, 1969, affirming United States District Court for the District of Colorado 31

APPENDIX B

Order, Judgment and Decree of the United States District Court entered October 17, 1968 43

APPENDIX C

Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim filed by Sears, Roebuck and Company, entered May 9, 1968 47

APPENDIX D

Memorandum Opinion, Findings of Fact, Conclusions of Law and Orders on Issues Raised by Trustee's Answer to Application to Foreclose or Reclaim filed by Montgomery Ward and Company entered June 13, 1968 57

APPENDICES (continued)

Page

APPENDIX E
Stipulation of Facts in the Matter of Marion Cummings, signed by James R. Horton, Trustee in Bankruptcy; Herbert W. DeLaney, Jr., attorney for Sears, Roebuck and Company; and Robert Carr, attorney for Bankrupt 66

APPENDIX F
Stipulation of Facts in the Matter of Benancio Ernest Dominguez, signed by William R. Young, Trustee in Bankruptcy; and Herbert W. DeLaney, Jr., attorney for Montgomery Ward and Company 71

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 235-68 - JULY TERM, 1969

IN THE MATTER OF MARION CUMMINGS, Bankrupt.	)	District Court No. 67-B-3416
IN THE MATTER OF AUDREY ALBERTA CUMMINGS, Bankrupt.	)	District Court No. 67-B-3417
IN THE MATTER OF BENANCIO ERNEST DOMINGUEZ, Bankrupt.	)	District Court No. 67-B-3892
IN THE MATTER OF CORA ESTHER DOMINGUEZ, Bankrupt.	)	District Court No. 67-B-3893

SEARS, ROEBUCK AND COMPANY and MONTGOMERY WARD AND COMPANY,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Herbert W. Delaney, Jr., filed a brief for appellants Sears, Roebuck and Company and Montgomery Ward and Company.

James R. Horton filed a brief for himself and for William R. Young as Trustees in Bankruptcy.

Before BREITENSTEIN, HILL and HOLLOWAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Voluntary petitions in bankruptcy were filed by Mr. and Mrs. Benancio Dominguez and by Mr. and Mrs. Marion Cummings. Dominguez had purchased household goods from Montgomery Ward and Company and given a purchase money chattel mortgage on which $211.77 was due at the time of bankruptcy. Cummings had purchased household goods from Sears, Roebuck and Company and given a purchase money chattel mortgage on which $338.11 was due at the time of bankruptcy. The chattel mortgages were not filed or recorded as required by Colorado law and were not valid as against third parties. Dominguez and Cummings claimed that the household goods were exempt under Colorado law. Sears and Montgomery Ward petitioned in the bankruptcy proceedings for permission to foreclose or reclaim. The referee denied the petitions and his decisions were affirmed by the district court on petitions to review.

We are met at the threshold with procedural complications. Four petitions for voluntary bankruptcy were filed. The referee entered one opinion and order in the Dominguez proceedings and one in the Cummings proceedings. Four petitions for review were filed in the district court. Without the entry of a formal order of consolidation, the district court disposed of all four petitions by one opinion and one order.

The one notice of appeal follows the pattern set by the district court in disposing of the petitions to review. It is filed on behalf of both Sears and Montgomery Ward, names all four bankrupts, and specifies the judgment appealed from. See Rule 3, F.R.A.P. Although the better practice would be to file a separate notice of appeal in each case, the record shows that the purpose of the rule was satisfied because notice was effectually given and there is no claim of any disadvantage to the appellees. See St. Marie v. United States, 9 Cir., 108 F. 2d 876, 880, cert. denied 311 U.S. 652. The failure to file separate appeals, or in the situation presented, separate applications for permission to appeal, is not, in the peculiar circumstances of this case, a fatal defect.

No attempt was made to obtain the permission of this court to appeal. Section 47(a), 11 U.S.C., requires an allowance of the appeal by the appellate court when the amount involved is less than $500. See also Rule 6, F.R.A.P. The amount claimed by Montgomery Ward is $211.77 and that claimed by Sears is $338.11. Separate and distinct claims may not be aggregated. See Snyder v. Harris, 394 U.S. 332, 336. An allowance of the appeal is necessary. The failure to file in the court of appeals a petition for allowance of the appeal is not a jurisdictional defect. See Reconstruction Finance Corp. v. Prudence Securities Advisory Group, 311 U.S. 579, 582. The court of appeals has power to treat the notice of appeal filed in the district court as an informal substitute for an application to the court of appeals. Mercado v. Feliciano, 1 Cir., 260 F. 2d 500, 502.

Such power should be exercised only in exceptional circumstances. See State of California v. Fred S. Renauld & Co., 9 Cir., 179 F. 2d 605, 608. The issue presented here is of sufficient importance to the administration of bankruptcy proceedings in the District of Colorado to be an exceptional circumstance. The appeal is allowed.

Young is the trustee of the two Dominguez bankrupt estates and Horton of the two Cummings estates. Upon a proper claim of statutory exemption, the two trustees set aside the household goods in question as exempt and such actions were approved by the referee. The sellers of the goods sought to foreclose or reclaim on the theory that their security interests were valid as between them and the purchasers. The trustees asserted that the security interests were void as to third parties and that the value of such interests went to the trustees for the benefit of the unsecured creditors.

The referee held that the security interests were invalid as to the trustees; that the security interests were preserved to the trustees for the benefit of the bankruptcy estates; that the exemptions claimed and allowed to the bankrupts apply only to the value of the goods in excess of the indebtedness due at the date of bankruptcy; that the bankrupts had thirty days to pay such indebtedness to the trustees; and that if the bankrupts fail to make such payments, the property shall be sold by the trustees with the proceeds in the amount of the indebtedness going to the bankruptcy estates and the excess to the bankrupts. The district court uphold the referee in all respects.

The Bankruptcy Act preserves the exemptions which are allowed by state law. 11 U.S.C. § 24, and Cantrell v. Molz-Frick Implement Company, 10 Cir., 278 F. 2d 546. Property which is exempt under state law and which is determined to be exempt by the bankruptcy court is no part of the estate in bankruptcy. 11 U.S.C. § 110(a), and Lockwood v. Exchange Bank, 190 U.S. 294, 299.

The trustees argue that the Colorado exemption statutes exempt only the bankrupts' equity in the property. The sellers urge that those statutes exempt the property which continues to be held by the bankrupts subject to the purchase money liens. Colo. R.S. 1963, § 77-2-2(1)(f) exempts

> "The household goods owned and used by the head of a family or owned by such head and used by his or her dependents to the extent of seven hundred fifty dollars in value, and owned and used by a single person to the extent of two hundred fifty dollars in value."

The word "value" as used in the foregoing is defined thus by Colo. R.S. § 77-2-1(6):

> "Value is the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens."

Colo. R.S. 1963 § 77-2-3 provides that no property is exempt from levy and sale for the purchase price thereof.

The sellers insist that an exemption statute must be read in terms of property. Heavy reliance is placed on In re Rade, D. C. Colo., 205 F. Supp. 336. In that case a credit union loaned the bankrupt part of the purchase price of an automobile and took back a mortgage which was not properly recorded. Colo. Rev. Stat. § 77-2-2(1)(k) exempts motor vehicles used in a gainful occupation to the value of $300. The bankrupt claimed this exemption. The referee held that the lien of the credit union was void as to the trustee. The automobile was ordered sold with the proceeds going to the estate except for the $300 exemption which should be paid to the credit union. The question certified to the district court was the validity of the order for payment to the credit union. The court upheld the referee. The dispute there was between the mortgagee and the bankrupt. Here it is between the mortgagees and the trustees. We are not concerned with the rights of the mortgagees against the mortgagors under purchase money mortgages. The point is that 11 U.S.C. § 110(e) makes the unrecorded mortgages void against the trustees. Rade does not discuss or decide the question of whether the Colorado statutory exemption on mortgaged household goods applies to the equity or to the property.

The sellers assert that Sears, Roebuck & Company v. Schulein, 9 Cir., 282 F. 2d 267, is dispositive of the issue. There the bankrupt had purchased a refrigerator and sewing machine from Sears on an unrecorded conditional sales contract and had claimed both items as exempt. The referee allowed the exemption to the extent of the excess in value over the unpaid balance and

required such balance to go to the trustee for the bankrupt estate. The court of appeals held to the contrary and said that § 70(e)(2) of the Act, 11 U.S.C. § 110(e)(2), does not authorize the trustee to enforce for the benefit of the estate conditional sales contracts on exempt property. 282 F. 2d 267 at 271.

The Schulein case differs from the case at bar because it was concerned with an exemption under a Washington statute which did not contain the definition of value found in the Colorado statute. See Revised Code of Washington, Title 6, § 6.16.020. This was pointed out by the referee who commented that the Washington statute was later amended to adopt substantially the Colorado definition of value.

We are aware of no Colorado decision which decides whether the § 77-2-2(1)(f) exemption applies to equity value, stated in terms of dollars, or to property. In such circumstances "we will accept the Federal trial judge's interpretation of his state law unless convinced that he is clearly wrong." Texaco, Inc., v. Pruitt, 10 Cir., 396 F. 2d 237, 243, and Dallison v. Sears, Roebuck and Co., 10 Cir., 313 F. 2d 343, 347.

The Colorado statute exempts household goods "to the extent of seven hundred fifty dollars in value" and defines value as the fair market value less any lien valid as between the owner and the holder of the lien. The two provisions must be read together. We have no legislative history and no pertinent Colorado decision. It is reasonable to construe the statutes to mean

that, when mortgaged property is claimed as exempt by a bankrupt, the exemption applies to the equity and not to the specific items of property. We cannot say that the referee and the district court were clearly wrong in so holding.

The effect of the Colorado exemption on the application of various provisions of the Bankruptcy Act must be considered. Section 47(a)(6), 11 U. S. C. § 75(a)(6), provides that the trustee shall set apart the bankrupt's exemptions as allowed by law and report the items and the estimated value to the court. Section 70(a), 11 U.S.C. § 110(a), vests title in the trustee to the bankrupt's property except for that which is exempt. Section 70(e)(1) says that certain transfers are void as against the trustee. Section 70(e)(2), 11 U.S.C. § 110(e)(2), reads:

> "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified

in paragraph (1) of this subdivision is valid under applicable Federal or State laws."

The proviso in the above quoted section was added by a 1952 amendment. The purpose and effect of the amendment is discussed in In re Espelund, W.D.Wash., 181 F.Supp. 108, 111-115 which holds that the proviso does not bring exempt property within the operation of the Act. In Schulein, the Ninth Circuit expressly approved of Espelund. See 282 F. 2d 267 at 270-271. Schulein and Espelund would be in point if it were not for the difference between the Colorado and the Washington exemption statutes. If the exemption is property, the proviso does not apply. In our opinion the proviso is applicable when the exemption is equity.

The real controversy here is between the sellers who want to collect the purchase price and the trustees who wish to invalidate the liens and take the proceeds, up to the amount of the liens, for the bankrupt estates. In either event the bankrupts get for themselves the equity and nothing more. The sellers benefit if the exemption applies to the articles of property because the purchase money mortgages are valid between the sellers and the purchasers. The general creditors benefit if the exemption applies to the equity because then the property becomes part of the bankrupt estate and the liens are invalid against the trustee who sells the property and pays into the estate the amount of the liens with the excess going to the bankrupts under their exemptions.

The sellers and the trustees alike seek support from the principle that the Colorado exemption laws "are to be liberally construed for the purpose of giving effect to the beneficent object in view." Haas v. DeLaney, D. C. Colo., 165 F. Supp. 488, 490, and Colorado decisions there cited. We recognize the principle but it is not controlling here. Under either theory the bankrupts get only their equities. The possibilities that the sellers might extend favorable installment terms or that the trustees might make more advantageous sales are entirely speculative so far as the record is concerned.

The conclusions of the referee and the district court that the pertinent Colorado statutes exempt the equity rather than the property are not clearly wrong and we accept them. It follows that the proviso of § 70(e)(2) is applicable and that the actions of the referee thereunder are authorized and proper.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO -
IN BANKRUPTCY

IN THE MATTER OF BENANCIO ERNEST DOMINGUEZ, Bankrupt.	)	NO. 67-B-3892
IN THE MATTER OF CORA ESTHER DOMINGUEZ, Bankrupt.	)	NO. 67-B-3893
MONTGOMERY WARD AND COMPANY, Petitioner.	)	
IN THE MATTER OF MARION CUMMINGS, Bankrupt.	)	NO. 67-B-3416
IN THE MATTER OF AUDREY ALBERTA CUMMINGS, Bankrupt.	)	NO. 67-B-3417
SEARS, ROEBUCK AND CO., Petitioner.	)	

ORDER, JUDGMENT AND DECREE

THE ABOVE CAPTIONED MATTERS coming on to be heard on the 23rd day of August, 1968, the Petitioners, MONTGOMERY WARD AND COMPANY and SEARS ROEBUCK AND CO., being represented by their Attorney, Herbert W. DeLaney, Jr., and William R. Young, Trustee of the Dominguezes' bankrupt estates appearing pro se, and James Horton, Trustee of the Cummingses' bankrupt estates, appearing by William R. Young, and said matters being

consolidated for hearing because of a common question of law involved, the COURT DOTH FIND:

That the bankrupts herein purchased certain items of household goods, the Dominguezes from Montgomery Ward and Company, and the Cummingses from Sears Roebuck and Co., and at the time of the purchases, the bankrupts executed a Chattel Mortgage on the items so purchased from their respective creditors.

That these chattel mortgages were not filed or recorded as required by 21-1-6, 1963 Colorado Revised Statutes, to be effective against third parties, this statute being in effect at the time the mortgages were executed.

The bankrupts herein filed voluntary Petitions and were adjudicated bankrupts and on their Petitions they claimed the articles purchased as exempt household goods under Chapter 77-2-2, 1963 Colorado Revised Statutes.

Pursuant to the Bankruptcy Act, the Trustees reported to the Referees that these exemptions were permissible and the Referees entered their orders approving the Trustees report of exempt property. The Petitioners then filed their Applications for Leave to Foreclose their Chattel Mortgages and take possession of the goods so mortgaged, whereupon the Trustees filed their Answers alleging that the liens asserted by the Petitioners were void as to the Trustees because the chattel mortgages were not perfected as to third parties, and praying that the Applications for Leave to Foreclose be denied but that nonetheless the

liens should be preserved for the benefit of the bankrupt estates and that the goods involved should be appraised and sold. Upon hearing, the Referees ruled that the mortgages were invalid as to the Trustees but that nonetheless the liens should be preserved under Section 70e of the Bankruptcy Act, the goods sold and any amounts received over and above the indebtedness due these creditors be paid over to the bankrupts, not to exceed the amount allowable under the exemption, and Montgomery Ward and Company and Sears Roebuck and Co. were given 30 days to file their claims as unsecured creditors.

The focal point at issue is the interpretation of the Colorado Exemption Statute which provides "that there shall be exempt from levy and sale under writ of attachment or writ of execution, household goods owned by the head of a family to the extent of seven hundred fifty dollars in value" (1963 Colorado Revised Statutes, 77-2-2 (8). Value is defined as "...the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens."

In the opinion of the Court, the definition of "value" disposes of the issues in this case and gives meaning to sub-section 77-2-2(8) as quoted above. It is obvious that the General Assembly of the State of Colorado intended that the exemption should be limited to the value over and above any valid lien or liens and that the rulings of the Referees in Bankruptcy in these cases were correct and in accordance with the law.

The liens being void as to the Trustee, being a third party, the liens might nonetheless be preserved for the benefit of the bankrupt estates under Section 70e(2) of the Bankruptcy Act. The Washington cases cited by the Petitioners herein are distinguished in that the statutes construed are not identical and accordingly there has been no clear error in the rulings of the referees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the rulings of the Referees in Bankruptcy in the above captioned bankrupt estates are determined to be correct and the orders issued by the referees are affirmed.

Done in Open Court this 17th day of October, 1968.

BY THE COURT

WILLIAM E. DOYLE

APPROVED AS TO FORM:

Herbert W. DeLaney, Jr.
HERBERT W. DeLANEY, JR.
Attorney for Petitioners, Montgomery Ward and Company and Sears Roebuck and Co.

W. R. Young
WILLIAM R. YOUNG, Trustee in Bankruptcy for the estates of Benancio Ernest Dominguez and Cora Esther Dominguez

James R. Horton
JAMES HORTON, Trustee in Bankruptcy for the estates of Marion Cummings and Audrey Alberta Cummings

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
IN BANKRUPTCY

In the Matter of	)	
MARION CUMMINGS,	)	No. 67-B-3416
Bankrupt,	)	
In the Matter of	)	
AUDREY ALBERTA	)	No. 67-B-3417
CUMMINGS,	)	
Bankrupt.	)	

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS ON ISSUES RAISED BY TRUSTEE'S ANSWER TO APPLICATION TO FORECLOSE OR RECLAIM FILED BY SEARS, ROEBUCK AND COMPANY

James R. Horton, Trustee, pro se
Herbert W. DeLaney, Jr., attorney for Sears, Roebuck and Company
Robert Carr, attorney for bankrupts

FULLERTON, Referee. In the matter of Marion Cummings, No. 67-B-3416, Sears, Roebuck and Company filed an application for leave to foreclose or reclaim upon a security interest in a washer, dryer, table and chairs, based upon a security agreement and a chattel mortgage, dated August 15, 1966 and May 25, 1965, respectively. The application contained the statement that no filing was necessary for perfection of this security interest because the property involved was specifically claimed exempt by the bankrupt and granted exempt by the Trustee.

To this application, the Trustee filed an Answer, alleging that the "lien" asserted by the applicant is void as to the Trustee because the chattel mortgage and security instrument were not perfected as to third parties and praying that the application to foreclose be denied; that the lien should be preserved for the benefit of the estate and that the goods involved be appraised and sold

The issues joined by these pleadings were submitted for determination on a Stipulation of Facts signed by the Trustee, the attorney for the applicant and the attorney for the bankrupts, it being a part of the stipulation that the determination made in No. 67-B-3416 shall also determine the relative interests of the respective parties in the matter of Audrey Alberta Cummings, No. 67-B-3417, wherein Marion Cummings' spouse is the bankrupt. The stipulated facts are that the bankrupts purchased a table and four chairs from Sears, Roebuck and Company on May 28, 1965 on an instalment sales contract for a total time sales price of $276.90, which contract called for a retention of title in the seller. On August 15, 1966, a similar contract was made for the purchase of a Kenmore automatic washer and electric dryer for a total time sales price of $390.68.

The bankrupts filed their voluntary bankruptcy petitions on September 22, 1967 and Mr. Horton was appointed and qualified as Trustee in each case and he has acted since October 17, 1967. At no time prior to the date of bankruptcy did Sears, Roebuck and Company make any type

of record filing either under the Colorado statutes governing chattel mortgages or under the Uniform Commercial Code as enacted in Colorado.

In the Schedule B-5 filed by Marion Cummings, a claim of exemption was made as follows:

> "Household Goods as Follows: C.R.S. 1963 77-2-2(f) 1 living room set, French Provincial; 3 end tables, 2 coffee tables, platform rocker, 3 lamps, tables, 1 dining room set, French Provincial; 1 French Provincial Bedroom Set, 2 unfinished type bedroom sets, desk & chair, couch, roll-a-way bed, stero console and recorder, Freezer, dryer, washer, Philco refrigerator, frigidaire, electric range, dinette table, 4 chairs, Crosley radio, pots, pans, kitchen utensils, dishes, bedding and linens." $750.00

Audrey Alberta Cummings made the same exemption claim in her schedules.

The Trustee filed his reports of exempt property in these two cases, wherein he reported as exempt, "household goods" of an estimated value of $250.00 in 67-B-3416 and a value of $750.00 in 67-B-3417. Orders approving these reports were duly entered.

It is not disputed that Sears, Roebuck and Company does not hold either a chattel mortgage or a security interest valid as against the Trustee. The question presented is the effect of the orders granting the exemptions as to household goods. While the Trustee's report did not give a particular description of such property, the

parties have, in effect, stipulated that the subject items are within the exemptions allowed.

The position of the applicant is that the allowance of these exemptions removed this property from any further jurisdiction of this Court so that the validity of the lien and security interest is a matter only between it and the bankrupts. The Trustee contends that under Sec. 70(e) of the Bankruptcy Act, he may seek preservation of the lien and security interest for the benefit of the estate. This contention is based on a previous ruling of this Court in the Matter of Thomas Charles West, No. 66-B-3119, decided by Referee Matsch. There, it was held that the lien was preserved because the Colorado exemption statute affords an exemption which attaches to the equity value of the household goods over and above the amount of any lien valid as between the parties.

Sec. 70e(2) of the Bankruptcy Act provides as follows:

> "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer

or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

In Sears Roebuck & Company v. Schulein (9th Cir. 1960) 282 F. 2d 267 and In re Espelund (D.C.W.D. Wash. 1960) 181 F. Supp. 108 the Trustee sought to preserve liens for the benefit of the estate in personal property which was claimed exempt under the statutes of the State of Washington. Those statutes, as they were in effect at the times of these cases provided for an exemption as follows:

> "To each householder one bed and bedding and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars coin in value. - - -" (Revised Code of Washington, Title 6, Section 6.16.020)[1]

These cases arising under Washington law were distinguished in the following language in West, supra:

---

[1] It may be noted that in 1965, this statute was amended to provide that "value shall mean the reasonable market value of the article or item at the time of its selection, and shall be of the debtor's interest therein, exclusive of all liens and encumbrances thereon." (Revised Code of Washington, 1967 Supplement, Title 6)

"In denying the applicability of the preservation clause of Sec. 70e(2) these courts found that the Bankruptcy Court's jurisdiction over exempt property was limited to a determination of and a setting aside of the property claimed exempt and therefore such property was no part of the bankruptcy estate and the trustee has no interest in such property. That is clear from Sections 6 and 70 of the Bankruptcy Act as explained in Lockwood v. Exchange National Bank 190 U.S. 294. (1903)

"The Colorado exemption statute, however is different in creating an exemption for household goods. 1963 CRS 77-2-2(8) provides that there shall be exempt from levy and sale under writ of attachment or writ of execution household goods owned by the head of a family 'to the extent of seven hundred fifty dollars in value....'. In 1963 77-2-1(6) value is defined as '....the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens."

Thus, the ruling in West was that since the Colorado statute only makes exempt the equity in household goods, it follows that in making the determination of the property to be set aside as exempt, the Trustee may invalidate an unperfected security interest and appropriate the same for the benefit of all of the creditors of the estate. Such a ruling has no effect on the bankrupts for the lien or security interest is valid as to them regardless of who holds it. As to the creditors claiming such

an interest, it may be noted that if the bankrupt had not claimed such property as exempt the lien would be invalid and the property would pass into the estate. Thus, such a creditor's rights rest entirely on the bankrupt's election. The purpose of the exemption laws is to give the debtor some basic protection from creditor process for a minimal amount of property necessary for the preservation of his family life. In Colorado, no such protection is granted against creditors holding contractual liens. That is the public policy reflected in the above quoted exemption statute. The Bankruptcy Act in subsection 70(e) and numerous other sections, reflects the policy of equality of distribution among creditors. To sustain the position of Sears, Roebuck and Company in the instant case it must be held that this policy should be cast aside if the bankrupt happens to claim an exemption and that it alone should benefit from the fact that its unperfected security interest described property which became the subject of an exemption claim. There is no logical basis for doing so since there is no benefit to the bankrupts from such a result. The ultimate result would be to award the exemption to Sears, Roebuck and Company, not to the bankrupt.

In considering the practical effects of this result, it may be noted that the purpose of the exemption statute is better achieved by transferring the lien to the Trustee than by granting the leave to foreclose for the latter situation, the creditor controls the situation and has the legal right to exact further consideration from the debtor for a forbearance from recovering possession of the subject property; whereas a

"foreclosure" by the Trustee is subject to the control and supervision of this Court. Thus, the opportunity for preserving the equity in the property is greater.

It is therefore concluded that the unperfected lien or security interest of Sears, Roebuck and Company in the subject property is valid as between that company and the bankrupts but invalid as to the Trustee; that the Trustee may preserve the lien for the benefit of the estate pursuant to Sec. 70(e) of the Bankruptcy Act; that such lien and security interest is valid as between the Trustee and the bankrupts' and that these interests are not subject to the exemptions claimed. The evidence establishes that the amount of the debt to Sears, Roebuck and Company as of the date of bankruptcy herein is $338.11.

The foregoing, duly considered, is hereby adopted as the findings of fact and conclusions of law herein, and it is therefore

ORDERED:

1. That the chattel mortgage and security interest of Sears, Roebuck and Company in the subject washer, dryer, table and chairs is invalid as to the Trustee herein.

2. That the indebtedness for which such security was contracted is $338.11 as of the date of bankruptcy herein.

3. That the lien and security interest in said personal property is preserved to the Trustee for the benefit of these bankruptcy estates.

4. That the exemptions claimed and allowed to the bankrupts herein for household goods shall apply only to such value of said washer, dryer, table and chairs as shall exceed $338.11.

5. That the bankrupts shall have thirty days from this date within which to pay to the Trustee $338.11 in discharge of his interest in such items of personal property.

6. That if the bankrupts shall fail to make such payment, the said items of personal property shall be delivered to the Trustee to be sold and the Trustee shall collect the proceeds of such sale to the extent of $338.11 plus the costs of sale, such proceeds and costs to be equally divided between these two bankruptcy estates, and any excess therefrom shall be remitted to the bankrupts.

7. That Sears, Roebuck and Company shall have thirty days from this date within which to file unsecured claims in these cases pursuant to the provisions of Sec. 57n of the Bankruptcy Act.

8. That Sears, Roebuck and Company shall have thirty days from this date within which to file a Petition for Review.

Dated at Denver, Colorado on May 9, 1968.

BY THE COURT:

Robert Fullerton
Referee in Bankruptcy

cc-James R. Horton
Robert Carr
Herbert DeLaney, Jr.
Honorable Benjamin C. Hilliard, Jr.
Honorable Richard P. Matsch
Honorable John F. McGrath

lvp

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO -
IN BANKRUPTCY

In the Matter of BENANCIO ERNEST DOMINGUEZ Bankrupt.	)	No. 67-B-3892
In the Matter of CORA ESTHER DOMINGUEZ Bankrupt.	)	No. 67-B-3893

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS ON ISSUES RAISED BY TRUSTEE'S ANSWER TO APPLICATION TO FORECLOSE OR RECLAIM FILED BY MONTGOMERY WARD AND COMPANY.

William R. Young, Trustee, pro se
Herbert W. DeLaney, Jr., attorney for Montgomery Ward and Company
No appearance for the bankrupt.

FULLERTON, Referee. Montgomery Ward and Company filed an application for leave to foreclose or reclaim upon a security interest in a guitar, amplifier and range, based upon a chattel mortgage, dated July 23, 1964. The application contained the statement that no filing was necessary for perfection of this security interest because the property involved was specifically claimed exempt by the Trustee and further that the subject property is mortgaged to another creditor.

To this application, the Trustee filed an Answer, alleging that the "lien" asserted by the applicant is void as to the Trustee because the chattel mortgage was not perfected as to third parties and praying that the application to foreclose be denied; that the lien should be preserved for the benefit of the estate and that the goods involved be appraised and sold.

The issues joined by these pleadings were submitted for determination on a Stipulation of Facts signed by the Trustee and the attorney for the applicant, it being a part of the stipulation that the determination made in No. 67-B-3892 shall also determine the relative interests of the respective parties in the matter of Cora Esther Dominguez, No. 67-B-3893, wherein Benancio Ernest Dominguez's spouse is the bankrupt. The stipulated facts are that the bankrupt purchased a guitar, amplifier and range from Montgomery Ward and Company prior to adjudication pursuant to the terms of a chattel mortgage. A copy of the stipulation is attached.

The bankrupts filed their voluntary bankruptcy petitions on October 31, 1967 and Mr. William R. Young was appointed and qualified as Trustee in each case and he has acted since November 28, 1967. At no time prior to the date of bankruptcy did Montgomery Ward and Company make any type of record filing either under the Colorado statutes governing chattel mortgages or under the Uniform Commercial Code as enacted in Colorado.

In the Schedule B-5 filed by Benancio Ernest Dominguez, a claim of exemption was made as follows:

"1963 C.R.S. Chapter 77, Article 2 Sec. 2: (F) Household Goods, gross value $910.00, ½ interest $455.00, Guitar $75.00, Amplifier $125.00."

Cora Esther Dominguez made a similar exemption claim in her schedules.

The Trustee filed his reports of exempt claim in her schedules.

The Trustee filed his reports of exempt property in these two cases, wherein he reported as exempt, "household goods, guitar and amplifier" of an estimated value of $655.00 in 67-B-3892 and "household goods" a value of $250.00 in 67-B-3893. Orders approving these reports were duly entered.

It is not disputed that Montgomery Ward and Company does not hold either a chattel mortgage or a security interest valid as against the Trustee. The question presented is the effect of the orders granting the exemptions as to the household goods, guitar and amplifier. The parties have stipulated that the subject items are within the exemptions allowed.

It should be mentioned at this point that the Trustee approved an order which was entered on December 27, 1967, allowing another creditor, The National City Bank of Denver, to foreclose upon the gas range and electric guitar which were subject to a valid lien duly recorded by said creditor and accordingly these two items are excluded from consideration in this opinion. Only the amplifier remains for determination herein.

The position of the applicant is that the allowance of these exemptions removed this property from any further jurisdiction of this Court so that the validity of the lien and security interest is a matter only between it and the bankrupts. The Trustee contends that under Sec. 70(e) of the Bankruptcy Act, he may seek preservation of the lien and security interest for the benefit of the estate. This contention is based on a previous ruling of this Court in the Matter of Thomas Charles West, No. 66-B-3119, decided by Referee Matsch. There it was held that the lien was preserved because the Colorado exemption statute affords an exemption which attaches to the equity value of the household goods over and above the amount of any lien valid as between the parties.

Sec. 70e(2) of the Bankruptcy Act provides as follows:

> "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in

paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

In Sears Roebuck & Company v. Schulein (9th Cir. 1960) 282 F. 2d 267 and In re Espelund (D.C.W.D. Wash. 1960) 181 F. Supp. 108 the Trustee sought to preserve liens for the benefit of the estate in personal property which was claimed exempt under the statutes of the State of Washington. Those statutes, as they were in effect at the times of these cases provided for an exemption as follows:

> "To each householder one bed and bedding and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars coin in value. - - -" (Revised Code of Washington, Title 6, Section 6.16.020)[1]

These cases arising under Washington law were distinguished in the following language in West, supra:

> "In denying the applicability of the preservation clause of Sec. 70e(2) these courts found that the Bankruptcy Court's jurisdiction over exempt property was limited to a

---

[1] It may be noted that in 1965, this statute was amended to provide that "value shall mean the reasonable market value of the article or item at the time of its selection, and shall be of the debtor's interest therein, exclusive of all liens and encumbrances thereon." (Revised Code of Washington, 1967 Supplement, Title 6)

determination of and a setting aside of the property claimed exempt and therefore such property was no part of the bankruptcy estate and the trustee has no interest in such property. That is clear from Sections 6 and 70 of the Bankruptcy Act as explained in Lockwood v. Exchange National Bank 190 U. S. 294. (1903)

The Colorado exemption statute, however is different in creating an exemption for household goods. 1963 CRS 77-2-2(8) provides that there shall be exempt from levy and sale under writ of attachment or writ of execution household goods owned by the head of a family 'to the extent of seven hundred fifty dollars in value....'. In 1963 77-2-1(6) value is defined as '....the fair market value of any property less the amount of any lien or liens thereon valid as between the owner of the property and the holder or holders of any such lien or liens.'"

Thus, the ruling in West was that since the Colorado statute only makes exempt the equity in household goods, it follows that in making the determination of the property to be set aside as exempt, the Trustee may invalidate an unperfected security interest and appropriate the same for the benefit of all of the creditors of the estate. Such a ruling has no effect on the bankrupts for the lien or security interest is valid as to them regardless of who holds it. As to the creditors claiming such an interest, it may be noted that if the bankrupt had not claimed such property as exempt the lien would be invalid and the property would pass into the estate. Thus,

such a creditor's rights rest entirely on the bankrupt's election. The purpose of the exemption laws is to give the debtor some basic protection from creditor process for a minimal amount of property necessary for the preservation of his family life. In Colorado, no such protection is granted against creditors holding contractual liens. That is the public policy reflected in the above quoted exemption statute. The Bankruptcy Act in subsection 70(e) and numerous other sections, reflects the policy of equality of distribution among creditors. To sustain the position of Montgomery Ward and Company in the instant case it must be held that this policy should be cast aside if the bankrupt happens to claim an exemption and that it alone should benefit from the fact that its unperfected security interest described property which became the subject of an exemption claim. There is no logical basis for doing so since there is no benefit to the bankrupts from such a result. The ultimate result would be to award the exemption to Montgomery Ward and Company, not to the bankrupt.

In considering the practical effects of this result, it may be noted that the purpose of the exemption statute is better achieved by transferring the lien to the Trustee than by granting the leave to foreclose for the latter situation, the creditor controls the situation and has the legal right to exact further consideration from the debtor for a forbearance from recovering possession of the subject property; whereas a "foreclosure" by the Trustee is subject to the control and supervision of this Court. Thus, the opportunity for preserving the equity in the property is greater.

It is therefore concluded that the unperfected lien or security interest of Montgomery Ward and Company in the subject property is valid as between that company and the bankrupts but invalid as to the Trustee; that the Trustee may preserve the lien for the benefit of the estate pursuant to Sec. 70(e) of the Bankruptcy Act; that such lien and security interest is valid as between the Trustee and the bankrupts' and that these interests are not subject to the exemptions claimed. The evidence establishes that the amount of the debt to Montgomery Ward and Company as of the date of bankruptcy herein is $211.77.

The foregoing, duly considered, is hereby adopted as the findings of fact and conclusions of law herein, and it is therefore

ORDERED:

1. That the chattel mortgage of Montgomery Ward and Company in the subject amplifier is invalid as to the Trustee herein.

2. That the indebtedness for which such security was contracted is $211.77 as of the date of bankruptcy herein.

3. That the lien and security interest in said personal property is preserved to the Trustee for the benefit of these bankruptcy estates.

4. That the exemptions claimed and allowed to the bankrupts herein for the amplifier shall apply only to such value of said amplifier as shall exceed $211.77.

5. That the bankrupts shall have thirty days from this date within which to pay to the Trustee $211.77 in discharge of his interest in such item of personal property.

6. That if the bankrupts shall fail to make such payment, the said item of personal property shall be delivered to the Trustee to be sold and the Trustee shall collect the proceeds of such sale to the extent of $211.77 plus the costs of sale, such proceeds and costs to be equally divided between these two bankruptcy estates, and any excess therefrom shall be remitted to the bankrupts.

7. That Montgomery Ward and Company shall have thirty days from this date within which to file unsecured claims in these cases pursuant to the provisions of Sec. 57n of the Bankruptcy Act.

8. That Montgomery Ward and Company shall have fifteen days from this date within which to file a Petition for Review.

Dated at Denver, Colorado on June 13, 1968.

BY THE COURT:

Robert Fullerton
Referee in Bankruptcy.

cc-William R. Young
Herbert W. DeLaney, Jr.

JJ

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO -
IN BANKRUPTCY

IN THE MATTER OF)
MARION CUMMINGS,) No. 67-B-3416
Bankrupt.)

STIPULATION OF FACTS

COMES NOW Marion Cummings, the Bankrupt above-named, Audrey Alberta Cummings, wife of the above-named Bankrupt and Bankruptcy No. 67-B-3417, by their attorney of Record, Robert Carr; Sears, Roebuck and Company (Cherry Creek) by its Attorney, Herbert W. DeLaney, Jr.; and James R. Horton, Trustee in the above-named Bankruptcy estate, and Stipulate and agree as follows:

1. That the facts of the present case and rule of Court in the instant case shall apply to and be controlling in the case of Audrey Cummings, Bankruptcy No. 67-B-3417, as well as in the instant case.

2. That on May 28, 1965, the Bankrupts purchased one table and four chairs from Sears, Roebuck and Company on a conditional sales contract, a copy of which is attached hereto as "Exhibit A", and which instrument was not filed or recorded with the County Clerk & Recorder.

3. That on August 15, 1966, the Bankrupts purchased one automatic washer and electric

dryer from Sears, Roebuck and Company on a conditional sales contract, a copy of which is attached hereto as "Exhibit B", and which instrument was not filed or recorded with the County Clerk & Recorder.

4. On date of September 22, 1967, the Bankrupts filed their voluntary petitions in bankruptcy and were duly adjudicated bankrupts.

5. On October 17, 1967, James R. Horton was duly appointed, qualified and is the acting trustee in both bankruptcy estates.

6. That in their original petitions and at all times subsequent thereto the Bankrupts have claimed the property as shown in "Exhibits A & B" as exempt property under the Exemption Statutes of The State of Colorado.

7. That subsequent to his appointment and prior to November 9, 1967, the trustee filed his Report of Exempt Property allowing said property as exempt property, and the Order Approving the same was duly entered by this Court.

8. On November 9, 1967, Sears, Roebuck and Company applied to this Court to foreclose upon or reclaim the property referred to in "Exhibits A & B" as is more fully set forth in such application on file herein.

9. That on date of November 17, 1967, the aforesaid application was answered by the trustee asserting the invalidity of the claimed lien as to the trustee, and praying for relief as is more fully set forth in the Trustee's Answer on file herein.

Respectfully Submitted.

s/s Robert Carr
Robert Carr
Attorney of Record for
Marion Cummings, No.
67-B-3416
Audrey Alberta Cummings,
No. 67-B-3417
2801 East Colfax Avenue
Denver, Colorado

Herbert W. DeLaney, Jr.
Herbert W. DeLaney, Jr.
Attorney for Sears, Roebuck
and Company
304 Denver U.S. National
Center
1700 Broadway
Denver, Colorado

James R. Horton
James R. Horton
Trustee in Bankruptcy
505 Bankers Union Life
Building
Denver, Colorado

This order is subject to the app. al of the Credit Sales Dept. of Sears, Ro. uck and Co. There are to be no agreements regarding it, other than those mentioned below or attached hereto in writing.

EASY PAYMENT ORDER BLANK

Sears, Roebuck and Co.

T. Kennedy
(Salesman)

SEARS, ROEBUCK and CO. Cherry Creek Date 8-15 19 66
Address of Store (Street Number, City, and State)

I hereby order the following merchandise:

DIVISION	DESCRIPTION	PRICE	
26	# 7450 Kenmore white Gator washer	313	18
	# 7551 " " electric dryer		
	# 5-3144 3' amp pigtail		
	2nd yr. service policy.		

Sears, Roebuck and Co.:

Beginning 7-5-66 I will pay $ 21.50 each month (last payment may vary slightly) until the balance on my Easy Payment account for merchandise hereby ordered has been paid. Until such payment has been made, I agree that: You shall retain title to and right of possession of said merchandise; I will not sell, remove, or encumber it; I shall be responsible for all loss of or damage to said merchandise; and, if I should default in any payment or payments, you may, at your option, take back the merchandise or affirm the sale and hold me liable for the unpaid balance on my account. I have the right to pay off in advance the full amount due and under certain conditions, to obtain a partial refund of the amount added for credit price.

Cash Price	313	18	313 18
Deposit			
Cash Balance			313 18
Added for Credit Price	77	50	77 50
Credit Price	390	68	390 68
Balance This Sale			390 68
Old Balance			
New Balance			

CUSTOMER'S SIGNATURE X Audrey Cummings

ADDRESS 7240 Kedney

CITY Denver ZONE STATE Colo

CUSTOMER'S NAME (PRINT) MARION (FIRST) CUMMINGS (LAST) AUDREY (WIFE'S FIRST NAME)

FIRST EP PAYMENT DUE

APPROVAL T. Kennedy DATE 8-15-66

HOW LONG AT PRESENT ADDRESS? OWN ☐ RENT ☐ BOARD ☐ PHONE NO. MARRIED ☐ SINGLE ☐

FORMER ADDRESS IF LESS THAN 2 YRS. AT PRESENT ADDRESS HOW LONG? AGE DEPENDENTS

EMPLOYER ADDRESS

HOW LONG? OCCUPATION? TIME CARD OR BADGE NO.? EARNINGS $ NO. WKLY.

FORMER EMPLOYER IF LESS THAN 1 YR. WITH PRESENT EMPLOYER HOW LONG?

NAME AND ADDRESS OF BANK CHECKING ☐ SAVINGS ☐ LOAN ☐

EXPLAIN OTHER INCOME, IF ANY

NAME AND ADDRESS	CREDIT REFERENCES	NAME AND ADDRESS
	OPEN	OPEN
	CLOSED	CLOSED
	OPEN	OPEN
	CLOSED	CLOSED

PREVIOUS YEARS ACCOUNT EP ☐ SRC ☐

DATE
APPROX. AMOUNT
WHAT STORE?
ACCOUNT NO.

	EP	SRC
DATE OPENED		
HIGH CREDIT		
PRESENT BAL. OR DATE CLOSED		
MONTHLY PAYMENTS		
NO. PMTS. DELINQUENT		
HOW PAID		

FILL IN THESE SPACES ON PURCHASES OF FURNACES, HEATING PLANTS, PLUMBING EQUIPMENT, INSTALLED CARPETING, ELECTRIC FIXTURES, ROOFING OR PAINT. ON THESE PURCHASES WE RESERVE THE RIGHT TO FILE MECHANICS LIEN

A portion of property to which material is to be installed (Do not mention or abbreviate locations) Cost of Property $

Name Mortgage Holder Address Mortgage Holder

Mortgage for $ Name of person holding legal title

FILL IN THESE SPACES IF PURCHASER IS FARMER:

Size of farm Name and Address of owner

P10683 Rev. 1-67

This order is subject to approval of the Credit Sales Dept. of Sears Roebuck and Co. There are to be no agreements regarding it, other than those mentioned below or attached hereto in writing.

Sears, Roebuck and Co.

By Mrs

EASY PAYMENT ORDER BLANK

SEARS, ROEBUCK, and CO. 1031 Date 5-25 19 65

Address of Store (Street Number, City, and State)

I hereby order the following merchandise:

QUANTITY	DESCRIPTION	PRICE
1	24442 - Table (1pc)	
	24443 - Chairs (3pc)	
	24444 - side chairs (2pc)	232 95

Sears, Roebuck and Co.:

Beginning 6-20-65 I will pay $ 16.00 each month (last payment may vary slightly) until the balance on my Easy Payment account for merchandise hereby ordered has been paid. Until such payment has been made, I agree that: You shall retain title to and right of possession of said merchandise; I will not sell, remove, or encumber it; I shall be responsible for all loss of or damage to said merchandise; and, if I should default in any payment or payments, you may, at your option, take back the merchandise or affirm the sale and hold me liable for the unpaid balance on my account. I have the right to pay all in advance the full amount due and under certain conditions, to obtain a partial refund of the amount added for credit price.

Cash Price	232 90	232 90
Deposit		
Cash Balance		232 90
Added for Credit Price	44 00	44 00
Credit Price	276 90	
Service Charge This Sale		276 90
Old Balance		
New Balance		

FIRST EP PAYMENT DUE 6-20-65

APPROVAL OK Duty DATE 5-25-

CUSTOMER'S SIGNATURE Mrs. Marion Cummings

ADDRESS 3240 KEARNEY

CITY Denver 80207 STATE Colo.

CUSTOMER'S NAME (PRINT) Marion Cummings Audrey
FIRST INITIAL LAST WIFE'S NAME FIRST

HOW LONG AT PRESENT ADDRESS? OWN ☐ RENT ☐ BOARD ☐ PHONE NO.

FORMER ADDRESS OF LESS THAN 2 YRS. AT PRESENT ADDRESS HOW LONG? MARRIED ☐ SINGLE ☐

EMPLOYER HOW LONG? AGE DEPENDENTS

NOW LONG? OCCUPATION? HOW LONG? SALARY $ NO. WKLY.

FORMER EMPLOYER (IF LESS THAN 1 YR. WITH PRESENT EMPLOYER)

NAME AND ADDRESS OF BANK CHECKING ☐ SAVINGS ☐ LOAN ☐

EXPLAIN OTHER INCOME, IF ANY NAME AND ADDRESS

1-POSTED-1
1031-DENVER-1031

MAY 25 1965

CREDIT REFERENCES

	OPEN ☐ CLOSED ☐		OPEN ☐ CLOSED ☐
	OPEN ☐ CLOSED ☐		OPEN ☐ CLOSED ☐

OK
CREDIT DEPARTMENT
BY

PREVIOUS SEARS ACCOUNT EP ☐ SRC ☐

DATE

APPROX. AMOUNT

WHAT STORE?

ACCOUNT NO.

	EP	SRC
DATE OPENED		
HIGH CREDIT		
PRESENT BAL. OR DATE CLOSED		
MONTHLY PAYMENTS		
NO. PMTS. DELINQUENT		
HOW PAID		

FILL IN THESE SPACES ON PURCHASES OF FURNACES, HEATING PLANTS, PLUMBING EQUIPMENT, INSTALLED CARPETING, ELECTRIC FIXTURES ROOFING OR PAINT. ON THESE PURCHASES WE RESERVE THE RIGHT TO FILE MECHANICS LIEN.

Location of property to which material is to be installed (Street address or other definite location)

Name Cost of Property $

Mortgage Holder Address Mortgage Holder

Mortgage No. Name of person ordering legal title

FILL IN THESE SPACES IF PURCHASER IS FARMER.

Size of Farm Name and Address of Landlord

Sears Rev. 1-65

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
In Bankruptcy

IN THE MATTER OF)	Bankrupt No.
BENANCIO ERNEST)	67-B-3892
DOMINQUEZ,)	STIPULATION
Bankrupt.)	OF FACTS

COME NOW Montgomery Ward and Company (Denver), by its attorney, Herbert W. DeLaney, Jr., and William R. Young, Trustee of the above-named Bankrupt Estate, and Stipulate and Agree as follows:

1. That the Facts of the present case and rule of Court in the instant case shall apply to and be controlling in the case of Cora Esther Dominquez, Bankrupt No. 67-B-3893, as well as in the above-entitled matter.

2. That prior to October 31, 1967, the Bankrupt purchased one Guitar, one Amplifier, and one Range, from Montgomery Ward and Company, pursuant to the terms and conditions of a Chattel Mortgage, which Chattel Mortgage was valid between the Bankrupt and Montgomery Ward and Company. Said Chattel Mortgage was not filed or recorded with the County Clerk and Recorder.

3. On October 31, 1967, Benancio Ernest Dominquez filed a voluntary Petition in Bankruptcy with the United States District Court for the District of Colorado, and was duly adjudged a Bankrupt.

4. Subsequently, William R. Young was duly appointed, qualified and is now the acting Trustee in said Bankrupt Estate.

5. The property involved which is secured by the Chattel Mortgage was claimed specifically exempt by the Bankrupt under the provisions of the applicable exemption statutes of the State of Colorado. That subsequent to the Trustee's appointment as Trustee, the Trustee filed his Report of Exempt Property allowing said property as exempt, and the Order approving the same was duly entered by this Court.

6. Montgomery Ward and Company made Application to Foreclose upon its Security Instrument.

7. That on January 17, 1968, the aforesaid Application was answered by the Trustee asserting the invalidity of the claimed lien as to the Trustee, on the basis that there is no evidence of filing of the Chattel Mortgage, and praying that the Application of Montgomery Ward and Company to Foreclose be denied, and that the lien asserted by Montgomery Ward be ordered void as to the Trustee, and that the property involved be appraised and sold under Order of the Court and for such other and further relief as may be proper.

Respectfully submitted,

HERBERT W. DeLANEY, JR.

Herbert W. DeLaney, Jr.
Attorney for
Montgomery Ward and Company
(Denver)

304 Denver U. S. National Center
1700 Broadway
Denver, Colorado 80202
266-1671

WILLIAM R. YOUNG

W. R. Young
Trustee of the Estate of
Benancio Ernest Dominquez,
Bankrupt
719 Symes Building
Denver, Colorado 80202
534-0281